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COURT OF CRIMINAL APPEALS
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Cause No. PD-0677-21

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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

HAROLD GENE JEFFERSON,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

Arising from Cause No. 11-18-00184-CR in the Eleventh Court of Appeals in Eastland, Texas,

---

PETITIONER'S BRIEF

IDENTITY OF JUDGE, PARTIES AND COUNSEL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

This Court denied oral argument. Petitioner presents an important question of first impression concerning a specific statutory construction issue and maintains that oral argument would aid in the Court's decision of the issue.

STATEMENT OF THE CASE

Appellant Harold Gene Jefferson was originally indicted on one count of Sexual Assault and one count of Indecency with a Child by Contact. CR 11-12. Following the State's granted Motion to Amend the Indictment, Appellant was charged with two additional offenses of Sexual Assault of a Child by Contact. A jury convicted Appellant on all counts and assessed punishment at 35 years on Count 1; 45 years on Count 2; 45 years on Count 3; and 25 years on Count 4. CR 42-50.

This is a challenge to an intermediate court's statutory interpretation of Texas Penal Code section 22.011(a)(2) and that court's related ineffective assistance determination.

STATEMENT OF PROCEDURAL HISTORY

Appellant presented two issues in his brief filed on July 12, 2019. His conviction was affirmed in an opinion not designated for publication. *See Jefferson v. State*, Cause No. 11-18-00184-CR, 2021 Tex. App. LEXIS 4843 (Tex. App.—

Eastland June 17, 2021). Appellant filed a motion for rehearing on August 2, 2021, and the 11th Court denied that motion on August 5, 2021. Appellant filed a Motion to Extend Time to File his petition for discretionary review on September 7, 2021, which was granted, and the petition was timely filed on October 18, 2021.

This Court granted discretionary review on both of Applicant's grounds, which, summarized are: (1) whether the 11th Court erroneously interpreted what constitutes an "additional or different offense" in the context of Texas Penal Code section 22.011(a)(2); and (2) whether the 11th Court applied an incomplete standard of review to dispose of Appellant's ineffective assistance of counsel claim.

STATEMENT OF FACTS

Petitioner's recitation of the facts is limited to those pertinent to his two asserted grounds. On June 4, 2018, at 8:05 a.m., the State filed a motion to amend Petitioner's indictment. CR 42-49. The amendment changed Petitioner's charged offenses from one count of sexual assault and one count of indecency with a child to three counts of sexual assault and one count of indecency. *Id.* Within two minutes of the filing, at 8:07 a.m., the trial court granted the amendment. CR 50.

The motion to amend presents that Trial Counsel was served with a copy of the motion, but that is highly improbable since the time between filing and the signing of the order was almost simultaneous. At the motion for new trial hearing, Trial Counsel stated that he: (1) received notice of the amendment; (2) appeared at

a hearing on the matter; and (3) objected to the additions. He testified that Petitioner was present at said hearing, that it was recorded in open court on the record, and should appear on the court's docket sheet. RR Supp. 2:70-71. In direct contradiction to Trial Counsel's statements, the record reveals there was no such recorded hearing; there was no entry on the docket sheet; and there was no appearance by Petitioner. *See* RR1. Rather, the trial court's docket sheet, on June 4, 2018 reads: "granted motion to amend indictment." CR 145. The State did not attempt to refute Trial Counsel's assertions during its closing argument. Even if a hearing existed, Trial Counsel failed to preserve an objection to the State's amendment by requiring a recorded hearing, or alternatively, objecting in writing to the lack of a court reporter.

As for the amendment itself, it originally listed two charges—(1) Sexual Assault of a Child and (2) Indecency with a Child (Two Priors). CR 11-12. The first charge is pertinent to Petitioner's presented grounds here. As written in the original indictment, the Sexual Assault of a Child charge was in violation of Texas Penal Code 22.011(a)(2)(A):

> **. . . [Petitioner] did then and there intentionally and knowingly cause the penetration of the female sexual organ of [CNM], a child who was then and there younger than 17 years of age, by the male sexual organ of the said [Petitioner].**

CR 11. The State's amended indictment purportedly added "two counts:"

> **The State would move to amend the Indictment by adding two counts. The State further moves to amend by adding the words "or mouth" after the words "his hand" at the end of the first paragraph**

of the current second count. After the amendment, the two new counts become the second and third counts. The current second count would then become the fourth count. The two counts added would be as follows. . .”

The State’s *amended* indictment, in pertinent part, included the following:

> COUNT 1: . . . [Petitioner] did then and there intentionally and [sic] knowingly cause the penetration of the female sexual organ of [CNM], a child who was then and there younger than 17 years of age, by the male sexual organ of the said [Petitioner]. — Violation of Texas Penal Code **22.011(a)(2)(A)**
>
> COUNT 2: . . . [Petitioner] did then and there intentionally and [sic] knowingly cause the mouth of [CNM], a child who was then and there younger than 17 years of age, to contact the male sexual organ of the said [Petitioner]. — Violation of Texas Penal Code **22.011(a)(2)(E)**
>
> COUNT 3: . . [Petitioner] did then and there intentionally and [sic] knowingly cause the female sexual organ of [CNM], a child who was then and there younger than 17 years of age, to contact the mouth of the said [Petitioner]. — Violation of Texas Penal Code **22.011(a)(2)(C)**

CR 45-46.

SUMMARY OF THE ARGUMENT

The Texas legislature intended the offenses listed in Texas Penal Code §22.011(a)(2), like the offenses listed in Texas Penal Code §22.021(a)(1)(B), to be treated as distinct acts constituting separate statutory offenses. This Court provided clear and sufficient guidance on this issue in *Vick v. State*, 991 S.W. 2d 830 (Tex. Crim. App. 1999). This Court’s reasoning and analysis of section 22.021 there is instructive of the approach to section 22.011 here. To apply the reasoning of *Vick*

here is to conclude that the State's amendment to Petitioner's indictment added statutory offenses not reviewed by the grand jury.

Additionally, the intermediate court failed to perform a complete *Strickland* analysis in response of Petitioner's claim that his trial counsel was ineffective for failure to object to the State's indictment amendments which added two new statutory offenses without presenting them to the grand jury. Rather, the court erroneously adopted the State's argument and reliance on *Stewart v. State*, accepting that "Trial Counsel 'may have had a reason for not objecting, such as avoiding unnecessary delay, that was not articulated or elicited through direct or cross examination.'" The record, which includes a motion for new trial hearing replete with Trial Counsel's contradicted testimony, belies such a conclusion. The State's amendments improperly added two new statutory offenses to Petitioner's indictment, and Trial Counsel should have objected pursuant to Texas Code of Criminal Procedure Art. 28.10(c). Trial Counsel's omission and Petitioner's harm are both apparent from the record, and together, amount to ineffective assistance of counsel, warranting a new trial.

GROUNDS FOR REVIEW

GROUND I: Whether the separate subsections of Texas Penal Code 22.011(a)(2) must be treated as separate statutory offenses, specifically, in consideration of Texas Criminal Code Article 28.10(c)?

GROUND II: Whether the 11th Court erred where it failed to determine that Trial Counsel was ineffective despite his omitted objection to the State's amendments that added statutory offenses not reviewed by the grand jury to Petitioner's indictment?

ARGUMENTS & AUTHORITIES

A. GROUND I: Whether the separate subsections of Texas Penal Code 22.011(a)(2) must be treated as separate statutory offenses, specifically, in consideration of Texas Criminal Code Article 28.10(c)?

1. Texas Penal Code 22.011 Sections (a)(2)(C) and (a)(2)(E) constitute different offenses sufficient to trigger Article 28.10(c)'s indictment rule.

On direct appeal, Petitioner asserted that he was denied effective assistance of counsel where Trial Counsel failed to object, preserve error, or otherwise contest the State's motion to amend the indictment to include additional offenses in violation of Texas Code of Criminal Procedure Art. 28.10(c). To decide that issue, the 11th Court had to first address whether the State's amendment added new statutory offenses. The 11th Court relied on two cases to determine that the State's motion to amend did not allege additional or different offenses, but merely added two additional counts of the same charged offense and did not violate 28.10(c). *See Flowers v. State* 815 S.W.2d 724, 728 (Tex. Crim. App. 1991); *see also Duran v. State, No. 07-07-0110-*

CR 2008 Tex. App. LEXIS 2160 (Tex. App.—Amarillo Mar. 26 2008, pet. ref'd.). The 11th Court's reliance on *Duran* was misplaced and yielded the wrong result.

In *Duran*, the 7th Court grappled with the same issue—whether the State's indictment amendments should be considered separate statutory offenses sufficient to trigger the protection of Article 28.10(c). The 7th Court briefly considered and cited to the *Flowers* opinion, acknowledging that in *Flowers*, this Court held that "an additional or different offense" under article 28.10(c) means a different statutory offense—that a change in an element of an offense changes the evidence required to prove an offense, but it is still the same offense. *Duran* at *6 (citing *Flowers* at 728).

In *Flowers*, this Court considered whether adding the definition of "unlawfully" to the indictment through an amendment over the appellant's objection violated Art. 28.10(c) and determined it did not because the §31.03 definitions of "unlawfully" were not essential elements of theft. *Flowers* at 727. In that case, this Court further reasoned that not only was the added section not an element of the offense, but it did not describe "an act or omission," by the defendant, so it did not need to appear in the indictment, and by extension, could be added through an amendment over appellant's objection without violating Art. 28.10(c).

However, including the definition of "unlawfully" in conjunction with a defendant's alleged violation of the theft statute is far from analogous to including additional alleged criminal acts committed by the defendant via amendments never

reviewed by the grand jury—as the State did in *Duran*, *Vick*, and this case. This Court's *Vick* opinion reflects that.

In *Vick*, a case decided eight years after *Flowers* and also appealed from the 7th Court, this Court unequivocally determined that the separately described conduct listed in Texas Penal Code 22.021 constitutes a "separate statutory offense." *Vick* at 833.

While the *Vick* holding focused on a double jeopardy issue, the reasoning there as to what constitutes a separate statutory offense must inform the Court's analysis here. In *Vick*, this Court delivered an opinion to answer the State's question presented in its petition for discretionary review: whether double jeopardy protection under the constitutions of Texas and the United States applies to prevent multiple prosecutions based on alleged violations of the same statue during the same criminal transaction. 991 S.W.2d 830 (Tex. Crim. App. 1999).

Appellee there was tried and acquitted of aggravated sexual assault, in violation of Texas Penal Code §22.021 based on a *first* indictment that alleged he "caused the penetration of the female sexual organ of [the child victim], by defendant's sexual organ." *Id.* at 831. Appellee was then indicted by a *second* indictment where it was alleged that he (1) "Caused contact of the female sexual organ of [the child victim] by [appellee's] sexual organ," and (2) "caused the female sexual organ of [the child victim] to contact the mouth of [appellee]." *Id.* The trial

court granted appellee's pre-trial motion to dismiss the indictment on double jeopardy grounds because it determined the second indictment charged the same offense for which appellee had been tried and acquitted. *Id.*

On appeal, the 7th Court sided with the trial court by way of rejecting the reasoning employed by the 5th Court in *David v. State* and misguidedly relying on its own *Sperling* decision to conclude that aggravated sexual assault is one offense containing several statutory alternative ways of committing the offense, capable of being alleged in one indictment. *Id.* at 832; *see David v. State*, 808 S.W.2d 239 (Tex. App.—Dallas, no pet.); *see also Sperling v. State*, 924 S.W.2d 722 (Tex. App.—Amarillo 1996, pet. ref'd). This Court disagreed with the 7th Court and interpreted Texas Penal Code §22.021 as the 5th Court did in *David*.

First, this Court performed a statutory analysis to determine whether the Legislature intended multiple prosecutions under section 22.021 to ascertain whether the appellee's conduct there violated two distinct statutory provisions within one statute and determined that it did. This Court characterized section 22.021 as a "conduct-oriented offense" in which the legislature criminalized very specific conduct of several different types. *Id.* Further, this Court noted that the statute separated the different sections by "or," which indicates 'that any one of the proscribed conduct provisions constitutes an offense.' *Id.* at 832-33. This Court then distinguished the focused conduct in each section:

> Section (i) [of Texas Penal Code §22.021(a)(1)(B)] prohibits penetration of a male or female child's anus or the sexual organ of a female child. ***The focus is on penetration of the child's genital area.***
>
> Section (ii) [of Texas Penal Code §22.021(a)(1)(B)] prohibits penetration of the child's mouth by the defendant's sexual organ. ***Both sections (i) and (ii) concern penetration of the child, one focusing on the genital area, and the other on the mouth.***
>
> In contrast, sections (iii) and (iv) address penetration and contact of another in a sexual fashion, by the sexual organ or anus of the child.

(emphasis added). *Id.* at 833. In short, this Court determined that 22.021 is a conduct-oriented statute; uses the conjunctive "or" to distinguish and separate different conduct; and its various sections specifically define sexual conduct in ways that usually require different and distinct acts to commit; therefore, each separately described conduct constitutes a separate statutory offense. *Id.*

In *Vick* the different conduct was charged in different indictments, so the appellee's overall issue was different. He claimed the second indictment charged him with an offense for which he was already acquitted and therefore violated double jeopardy. This Court, based on the analysis above, determined that the second indictment did not violate double jeopardy because it charged violations of separate and distinct statutory aggravated sexual assault offenses. *Id.*

The same reasoning must apply here. Texas Penal Code Section 22.011, also a sexual assault statute, also includes separate and distinct statutory offenses that

must be treated as such, despite their appearing in a single statute. *Id.* at 833; *see Cochran v. State*, 874 S.W.2d 769 (Tex. App.—Houston [1st Dist.] 1994, no pet.); see also *David*, 808 S.W.2d 239.

§ 22.011. SEXUAL ASSAULT

(a) A person commits an offense if:

(2) Regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly:

(A) Causes the penetration of the anus or sexual organ of a child by any means;

(B) Causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) Causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(D) Causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; ***or***

(E) Causes the mouth of a child to contact the anus or sexual organ of another person, including the actor

(emphasis added). Because Texas Penal Code 22.011's separate sections must be treated as separate statutory offenses pursuant to *Vick*, the 11th Court in Petitioner's case should have determined and clearly presented that the State's amendments here added "additional or different offenses" contemplated by Article 28.10(c) to Petitioner's indictment, not just additional "counts." *See* 11 COA Mem. Op., 10.

B. <u>GROUND II</u>: Whether the 11th Court erred where it failed to determine that Trial Counsel was ineffective despite his omitted objection to the State's amendments that added statutory offenses not reviewed by the grand jury to Petitioner's indictment?

As established in Ground I above, the State's amendment here added two additional statutory offenses to Petitioner's indictment without presenting them to the grand jury for review. Had Trial Counsel objected pursuant to Article 28.10(c), the court could not have granted the State's motion to amend, or at least would have erred in doing so.

But Trial Counsel did not object. Petitioner clearly explained in his appellant's brief that Trial Counsel did not object. *See* Appellant's Br., 19-20.

In its analysis, the 11th Court characterized the question of whether Trial Counsel objected to the amended indictment as a "factual dispute" that the trial court "must assume that the trial court resolved. . . in support of its ruling that denied the motion for new trial." 11 COA Mem. Op., 10. The Court's assumption immediately followed its own acknowledgment and recitation of the facts that worked against Trial Counsel here:

> There is no reporter's record from a hearing on the State's motion to amend the indictment (which contradicts Trial Counsel's motion for new trial testimony). The State's motion to amend the indictment was filed on June 4, 2018. The docket sheet contains the following entry: '6-4-18 Granted motion to amend indictment.' On June 7 2018, Trial Counsel filed a "Demand for Postponement," wherein he asserted that the trial setting of June 11, 2018 should be canceled in order that he would have at least ten days to respond to the amended indictment. *See*

> Tex. Code Crim. Proc. Art. 28.10(a). The trial court granted the request by resetting the trial date to June 25, 2018.

Id. The 11th Court acknowledged that there was no hearing on the State's Motion to Amend—even though Trial Counsel testified at the new trial hearing that there was such a hearing, and further, that he objected to the State's motion at that hearing. RR Supp. 2:70-71. So, while the 11th Court aptly characterized Petitioner's assertion that Trial Counsel did not object as a "factual dispute," it was a dispute easily quelled. The record proves that Trial Counsel did not object.

Trial Counsel's failure to object pursuant to Article 28.10(c) satisfied the first *Strickland* prong set forth in *Ex parte White*—it is ineffective assistance of counsel where Trial Counsel fails to object and appellant can show that the trial court would have committed error in overruling the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *see Strickland v. Washington*, 466 U.S. 668 (1984). Had Trial Counsel objected to the State's amendments here, and in light of Ground 1 above, Article 28.10(c) dictates that the trial court would have erred in granting the State's motion. The first *Strickland* prong was and is satisfied.

The 11th Court should have examined the second prong of *Strickland* but did not. Instead, the Court entertained a hypothetical put forth by the State that was unsupported by the developed record. The 11th Court offered that even if Trial Counsel did not object, he may have had a strategic reason not to. The Court, adopting the State's approach, cited to the unpublished *Stewart v. State* and

hypothesized that perhaps Trial Counsel did not want to oppose a requested amendment in order to avoid unnecessary delay. 11 COA Mem. Op. 10-11; *see Stewart v. State*, No. 05-95-01056-CR, 1997 Tex. App. LEXIS 2103 (Tex. App.—Dallas April 23, 1997, no pet.).

The record simply does not reflect such a strategy. Unlike the record in *Stewart*, which was undeveloped beyond the original trial phase and invited a reviewing court's "what ifs," the record here contained a motion for new trial hearing where the Trial Counsel did not even allude to a strategic decision made in order to avoid unnecessary delay. Instead, Trial Counsel testified that he *did* object to the amendments when he clearly did not. Yet rather than interpret the record as it plainly appeared, the 11th Court adopted the State's unsupported and contradicted hypotheses presented on behalf of Trial Counsel, and conveniently, but improperly neutralized Trial Counsel's error.

Additionally, in its briefest analysis of the second portion of Article 28.10(c), the 11th Court noted that Petitioner's defensive theory was the same for all offenses, therefore his substantial rights were not affected since his right to present a defense was not impaired. 11 COA Mem. Op., 11. That is untrue. Although insufficiently investigated and ineptly presented at trial, part of the defense's theory included Petitioner's diagnosed erectile dysfunction and consequent sexual limitations. RR5:22; *see also* Appellant's Br., 16. Such a defense does little to defend against a

charge of performing oral sex on a child, the added "Count III" to Petitioner's indictment. *See* TEX. PENAL CODE §22.011(a)(2)(C). Petitioner's defense theory was not, and could not have been the same for each separate offense.

The 11th Court should have determined that *Strickland's* first prong as applied in *Ex parte White* was satisfied here, and further, that Trial Counsel's failure to object resulted in Petitioner's harm. Not only were two of Petitioner's charges indicted without grand jury review, but Petitioner's substantial rights prejudiced, and moreover, Petitioner received 10 years more than he otherwise would have had the amendments not been permitted. Petitioner received 45 years on the added offenses 2 and 3, and 35 and 25 years on offenses 1 and 4, respectively.

Whether it is because the amendment charged Petitioner with addition statutory offenses, as it did, or whether it is because the amendment prejudiced Petitioner's substantial rights, as it did, Trial Counsel should have objected. Failure to object and prevent the State from amending Petitioner's indictment was an error that resulted in Petitioner's harm and therefore amounted to ineffective assistance. The 11th Court erred where it did not conclude the same.

PRAYER FOR RELIEF

Based on the foregoing, Petitioner prays this Court reverse the opinion and judgment of the 11th Court of Appeals and remand to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on January 28, 2022, a true and correct copy of the above and foregoing document was served on the Taylor County District Attorney's Office, Taylor County, Texas, by e-service.

/s/ Jacob Blizzard
Jacob Blizzard

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/s/ Jacob Blizzard
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